

LATINO AFFAIRS DIVISION [433]

Notice of Intended Action

Pursuant to the authority of Iowa Code sections 17A.3 and 216A.16, the Latino Affairs Division hereby gives Notice of Intended Action to adopt Chapter 8, "Waiver Rules" Iowa Administrative Code.

Executive Order Number 11 issued on September 14, 1999, requires each agency with authority to adopt rules, as defined in Iowa Code sections 17A.2(1) and 17A.2(11), to initiate rule-making proceedings to adopt the Uniform Waiver Rule outlined in the Executive Order. Executive Order Number 11 was published in the Iowa Administrative Bulletin, Volume XXII, Number Seven, dated October 6, 1999. Adoption of this new chapter will provide the Division with waiver rules.

Any interested person may make written suggestions or comments on these proposed rules on or before March 13, 2001. Such written materials should be directed to the Administrator, Division of Latino Affairs, Lucas State Office Building, Second Floor, Des Moines, Iowa 50319; fax (515)242-6119.

Persons are also invited to present oral or written suggestions or comments at a public hearing which will be held on March 13, 2001, at 10a.m. in the Administrator's Office, Division of Latino Affairs, Lucas State Office Building, Des Moines, Iowa 50319. At the hearing, persons will be asked to confine their remarks to the subject of the rules.

Any persons who intend to attend the public hearing and have special requirements such as hearing or mobility impairments should contact the Division of Latino Affairs in advance of the hearing and advise of specific needs.

These rules are intended to implement Executive Order Number 11 and Iowa Code section 17A.9A.

The following new chapter is proposed.

CHAPTER 8

WAIVER RULES

433—8.1(17A) Definition. The term “waiver” as used in this chapter means a prescribed waiver or variance from a specific rule or set of rules of this division applicable only to an identified person on the basis of the particular circumstances of that person.

433—8.2(17A) Scope of chapter. This chapter creates generally applicable standards and a generally applicable process for granting individual waivers from rules adopted by the division in situations when no other more specifically applicable law provides for waivers. To the extent another more specific provision of law purports to govern the issuance of a waiver from a particular rule, the more specific waiver provision shall supersede this chapter with respect to any waiver from that rule.

433—8.3(17A) Applicability. This chapter applies only to waivers of those division rules that are within the exclusive rule-making authority of the division. This chapter shall not

apply to rules that merely define the meaning of a statute, or other provisions of law or precedent, if the division does not possess statutory authority to bind a court, to any extent, with its definition.

433—8.4(17A) Compliance with law. The division may not issue a waiver under this chapter unless (1) the legislature has delegated authority sufficient to justify the action; and (2) the waiver is consistent with statute and other provisions of law. No waiver may be granted under this chapter from any mandatory requirement imposed by statute.

433—8.5(17A) Criteria for a waiver. The division may issue an order, in response to a completed petition or on its own motion, granting a waiver from a rule adopted by the division, in whole or in part, as applied to the circumstances of a specified person, if the division finds that the waiver is consistent with rules 8.3(17A) and 8.4(17A) of this chapter, that the waiver would not prejudice the substantial legal rights of any person, and either that:

1. The application of the rule to the person at issue does not advance, to any extent, any of the purposes for the rule or set of rules; or
2. All of the following criteria have been met:
 - * The application of the rule or set of rules to the person at issue would result in an undue hardship or injustice to that person; and
 - * The waiver on the basis of the particular circumstances relative to the specified person would be consistent with the overall public interest.

In determining whether a waiver would be consistent with the public interest, the division administrator shall consider whether, if a waiver is granted, the public health, safety, and welfare will be adequately protected by other means that will ensure a result that is substantially equivalent to full compliance with the rule.

433—8.6(17A) Division discretion. The final decision to grant or deny a waiver shall be vested in the division administrator. This decision shall be made at the discretion of the division, upon consideration of relevant facts.

433—8.7(17A) Burden of persuasion. The burden of persuasion shall be on the petitioner to demonstrate by clear and convincing evidence that the division should exercise its discretion to grant a waiver based upon the criteria contained in rule 8.5(17A) of this chapter.

433—8.8(17A) Contents of petition. A petition for a waiver shall include the following information where applicable and known to the requester:

1. The name, address, and telephone number of the entity or person for whom a waiver is requested and the case number of any related contested case.
2. A description and citation of the specific rule or set of rules from which a waiver is requested.
3. The specific waiver requested, including a description of the precise scope and operative period for which the petitioner wants the waiver to extend.

4. The relevant facts that the petitioner believes would justify a waiver. This statement shall include a signed statement from the petitioner attesting to the accuracy of the facts represented in the petition and a statement of reasons that the petitioner believes will justify a waiver.
5. A history of any prior contacts between the petitioner and the division relating to the activity affected by the proposed waiver including any notices of violation, contested case hearings, or investigative reports relating to the activity within the last five years.
6. Any information known to the requester relating to the division's treatment of similar cases.
7. The name, address, and telephone number of any public agency or political subdivision which also regulates the activity in question or which might be affected by the granting of a waiver.
8. The name, address, and telephone number of any person or entity that would be adversely affected by the granting of a petition.
9. The name, address, and telephone number of any person with knowledge of the relevant facts relating to the proposed waiver.
10. Signed releases of information authorizing persons with knowledge of the waiver request to furnish the division with information relevant to the waiver.

433—8.9(17A) Additional information. Prior to issuing an order granting or denying a waiver, the division may request additional information from the petitioner relative to the

petition and surrounding circumstances. If the petition was not filed in a contested case, the division may, on its own motion or at the petitioner's request, schedule a telephonic or in person meeting between the petitioner and a representative from the division to discuss the petition and surrounding circumstances.

433—8.10(17A) Notice. The division shall acknowledge the petition upon receipt. The division shall ensure that, within 30 days of the receipt of the petition, notice of the pendency of the petition and a concise summary of its contents have been provided to all persons to whom notice is required by any provision of law. In addition, the division may give notice to other persons. To accomplish this notice provision, the division may require the petitioner to serve the notice on all persons to whom notice is required by any provision of law and provide a written statement to the division attesting to the fact that notice has been provided.

433—8.11(17A) Hearing procedures. The provisions of Iowa Code sections 17A.10 to 17A.18A regarding contested case hearings shall apply to any petition for a waiver of a rule or set of rules filed within a contested case and shall otherwise apply to division proceedings for a waiver only when the division so provides by rule or order or is required to do so by statute or other binding law.

433—8.12(17A) Ruling. An order granting or denying a waiver shall be in writing and shall contain a reference to the particular person and rule or portion thereof to which the

order pertains, a statement of the relevant facts and reasons upon which the action is based, and a description of the precise scope and operative time period of a waiver if one is issued.

433—8.13(17A) Conditions. The division may condition the granting of the waiver on such conditions that the division deems to be reasonable and appropriate in order to achieve the objectives of the particular rule in question through alternative means.

433—8.14(17A) Time for ruling. The division shall grant or deny a petition for a waiver as soon as practicable in any event, but, shall do so within 120 days of its receipt unless the petitioner agrees to a later date. However, if a petition is filed in a contested case, then the division may grant or deny the petition at the time the final decision in that contested case is issued.

433—8.15(17A) When deemed denied. Failure of the division to grant or deny a petition within the required time period shall be deemed a denial of that petition by the division. However, the division shall remain responsible for issuing an order denying a waiver as required by rule 8.12(17A).

433—8.16(17A) Service of orders. Within seven days of its issuance, any order issued under this chapter shall be transmitted to the petitioner or the person to whom the order pertains and to any other person entitled to such notice by any provision of the law.

433—8.17(17A) Record keeping. Subject to the provisions of Iowa Code section 17A.3(1)"e", the division shall maintain a record of all orders granting and denying waivers under this chapter. All final rulings in response to requests for waivers shall be indexed and copies distributed to members of the administrative rules review committee upon request. All final rulings shall also be available for inspection by the public at the division office during regular business hours.

433—8.18(17A) Cancellation of a waiver. A waiver issued by the division pursuant to this chapter may be withdrawn, canceled, or modified if, after appropriate notice and hearing, the division issues an order finding any of the following:

1. The person who was the subject of the waiver order withheld from the division, or knowingly misrepresented to the division material facts relevant to the propriety or desirability of the waiver; or
2. The alternative means of ensuring that the public health, safety, and welfare will be adequately protected after issuance of the waiver order has been demonstrated to be insufficient, and no other means exists to protect the substantial legal rights of any person; or
3. The subject of the waiver order has failed to comply with all of the conditions contained in the order.

433—8.19(17A) Violations. A violation of a condition in a waiver order shall be treated as a violation of the particular rule for which the waiver was granted. As a result, the recipient of a waiver under this chapter who violates a condition of the waiver may be subject to the same remedies or penalties as a person who violates the rule at issue.

433—8.20(17A) Defense. After the division issues an order granting a waiver, the order shall constitute a defense, within the terms and the specific facts indicated therein, for the person to whom the order pertains in any proceeding in which the rule in question is sought to be invoked.

433—8.21(17A) Appeals. Appeals within the division from a decision granting or denying a waiver shall be in accordance with Iowa Code chapter 17A and division rules. These appeals shall be taken within 30 days of the issuance of the ruling granting or denying the waiver request, unless a different time is provided by rule or statute.

These rules are intended to implement Executive Order Number 11 and Iowa Code section 17A.9A.

Elizabeth Salinas Newby
Contact Person

Date
